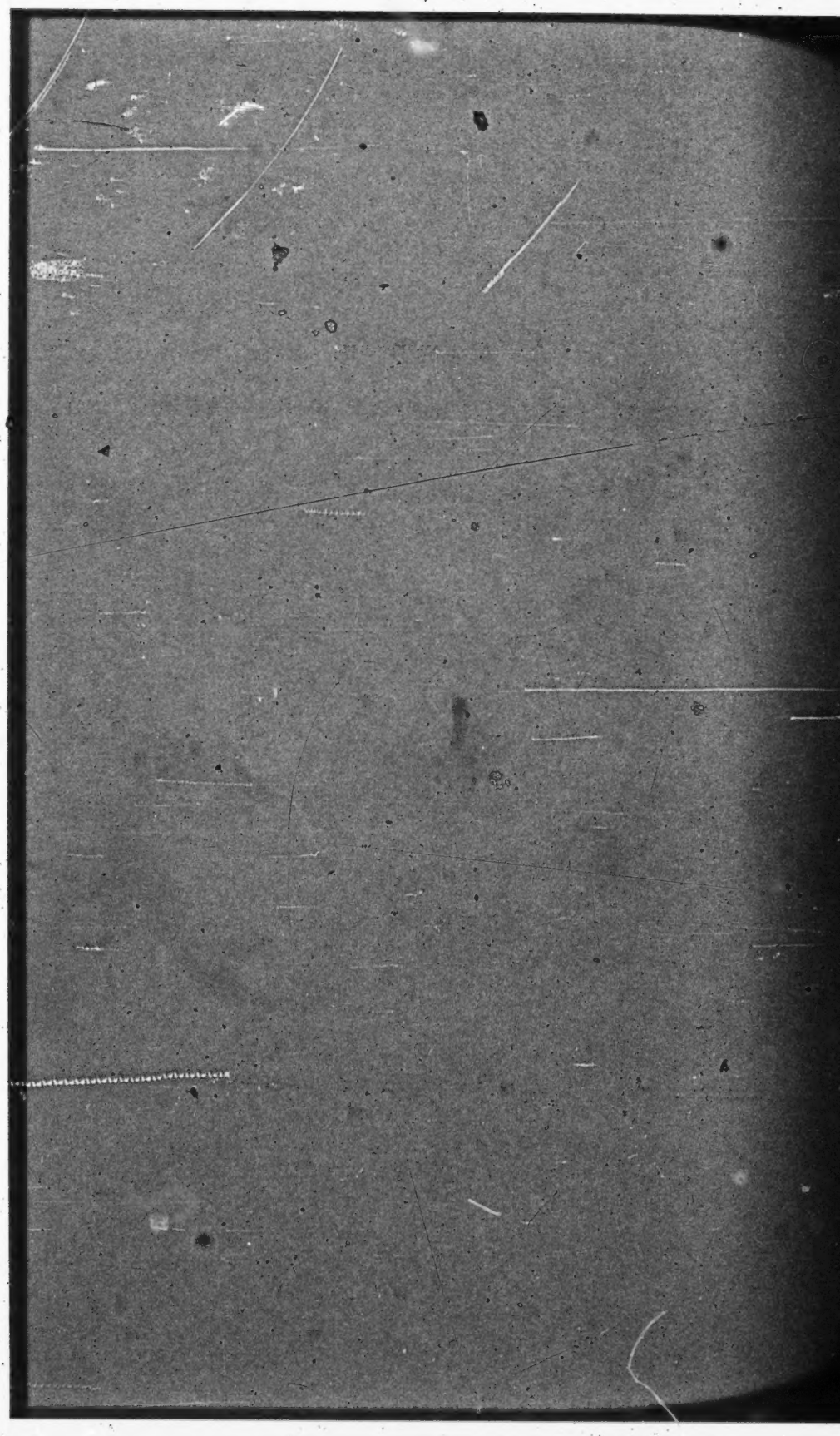

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No. 563

In the Supreme Court of the United States

OCTOBER TERM, 1930

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION

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Of Counsel.

MARCH, 1931.

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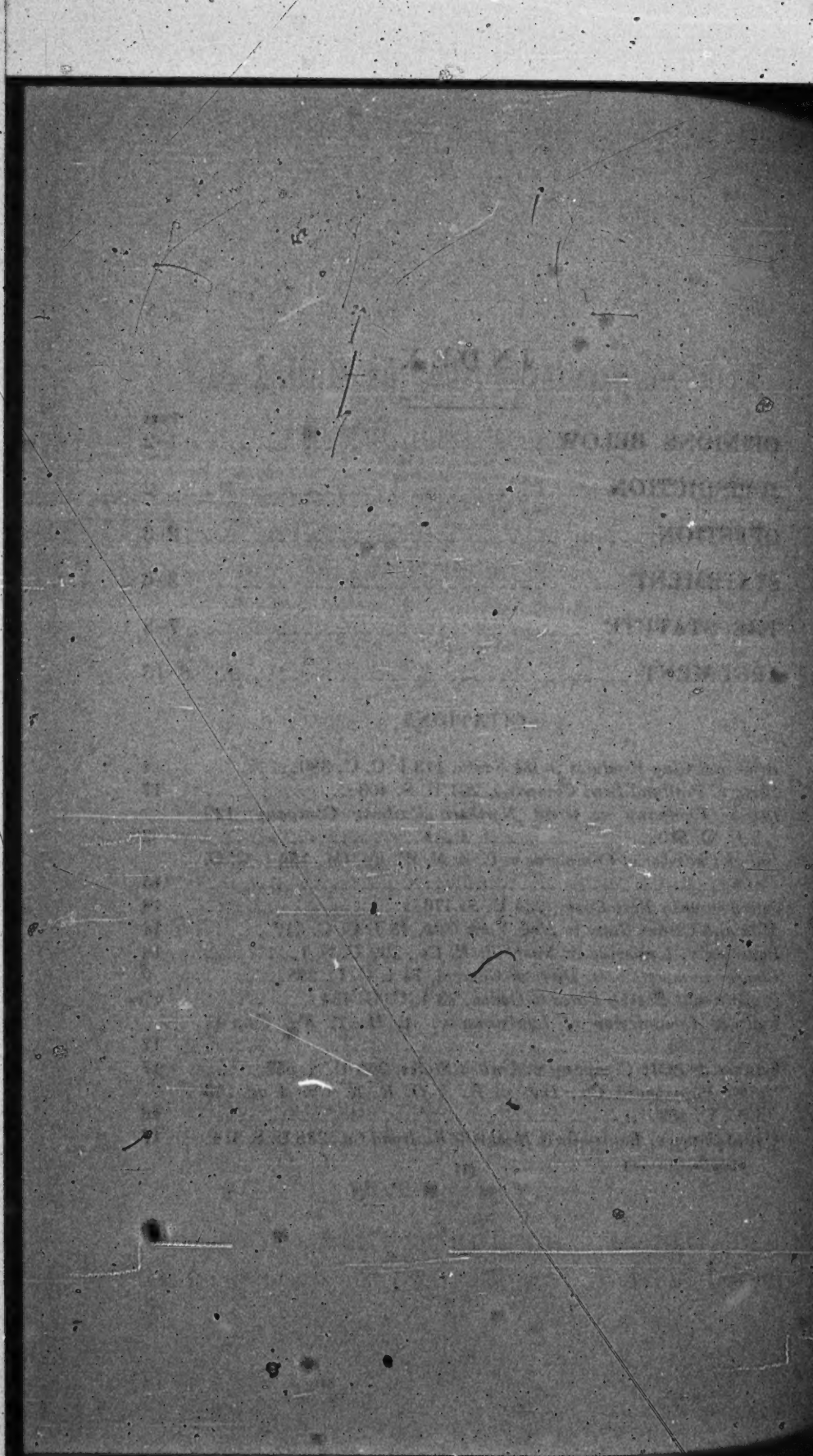

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BRIEF FOR INTERSTATE COMMERCE COMMISSION

Pursuant to leave of Court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief to have corrected the construction placed upon Section 4 of the Interstate Commerce Act (U. S. Code, Title 49, Section 4) by the Circuit Court of Appeals for the Eighth Circuit, the effect of which, in the opinion of the Commission, permits or authorizes, in certain instances, the ignoring of the long-and-short-haul provision of that section.

OPINIONS BELOW

The opinion of the District Court (R. 6) is reported in 34 F. (2d) 221, and the opinion of the

Circuit Court of Appeals (R. 74) is reported in 43 F. (2d) 780.

The Commission's decision is reported as Docket No. 16576, *Delmar Company* v. *Great Northern Railway Company*, 120 I. C. C. 530. (R. 51.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 16, 1930. (R. 78.) The petition for certiorari was filed November 24, 1930, and certiorari was granted January 19, 1931, 282 U.S. ——. (R. 78.)

QUESTION

In its decision the Circuit Court of Appeals sustained the Commission's reparation order in this case, but in so doing we think it passed upon the Commission's construction of the tariff involved in such a manner that, if it be regarded as a correct principle of the law, permits or authorizes, in certain instances, the ignoring of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. (U. S. Code, Title 49, Section 4.) Further the ruling of the Court is contrary to the construction which has been followed by the Commission since Section 4 was amended in 1910. It should be understood that our only concern lies with the construction the lower court has placed on Section 4. With the Court's finding that the route over which the shipments moved was an open and unrestricted route, and that, if the car-

rier intended the rate to apply only over the direct route, it could easily have made a notation in its tariff to that effect, we have no dispute. (R. 77.)

The question is as to the validity of the interpretation the court has placed upon Section 4. (R. 77.)

STATEMENT

The pertinent facts are: Numerous shipments of grain originated at points on the line of the Great Northern Railway Company in Minnesota, North Dakota, and South Dakota, and were billed originally to Minneapolis, Minn. After delivery at Minneapolis, the shipments were reconsigned by the Delmar Company in the same cars to Superior, Wis., where delivery was made. The entire movement, from points of origin to Superior, was over the rails of the Great Northern. That carrier collected its local rates from origin points to Minneapolis, plus a proportional rate of 6 cents on corn, oats, and rye, and 6.5 cents on wheat, beyond. The direct route to Superior from the several points of origin (excepting two, Litchfield and Rogers, Minn.,[1]) is shorter than the route traversed, via Minneapolis, and the combination of rates exacted were higher than the rates specified in the tariffs for transporting the grain from originating points

[1] The Great Northern offers to refund the admitted overcharges on the shipments from Litchfield and Rogers. (R. 82.)

to Superior. (R. 52–53.) As shown by a table in the record (R. 53) the actual haul from points of origin (again excepting Litchfield and Rogers) to Superior range from 43.7 miles to 75.7 miles greater than the shortest mileage. In terms of percentage, the actual haul amounts to from 12 to 23 per cent more mileage than that via the shortest route. The plaintiff before the Commission (The Delmar Company) contended, and its contention was adopted by the Commission, that the rates from the points of origin to Superior applied via Minneapolis—although that was the longer distance—because the tariff did not expressly restrict the application of the rate to the shorter and more direct route. Upon this basis the Commission made its award. (R. 52–59.)

Speaking of the rule of construction employed by the Commission and in affirming the action of the District Court sustaining the award, the Circuit Court of Appeals said:

> The rule of construction employed by the Commission is that where there is more than one route from a point of origin to destination, a rate between those points applies to a shipment over any one of those routes unless that route is unreasonably circuitous or unless the carrier has limited the rate in the tariff to a particular route designated therein. This rule has been repeatedly announced and applied by the Commission. * * * Where a departmental ruling or construction has been of long standing and

application, it should be accepted unless "plainly wrong." * * * This is particularly true where the subject matter of the regulation requires uniformity and is technical in character, as are railway rate tariffs. * * * The rule of tariff construction involved here is firmly established in statement and application by the Commission (cases first above cited). It should not be set aside or disregarded unless clearly opposed to law or unreasonable. The reasoning creating the rule is that the carrier may, if it has a particular route in mind for a particular tariff, easily express its intention in the tariff; that not to do so leaves the tariff difficult of construction for the shipper and the local agent of the carrier; that in opening the door for more than one meaning the tariff creates a situation where different interpretations by different local agents might result in discrimination between shippers. This reasoning impresses us as being essentially sound. Therefore, the rule of construction of the Commission should be and is approved. (R. 75–76.)

We come now to the contention of the Great Northern Railway that the rule of tariff interpretation should not be adopted in this case because it would result in violations of the so-called long-and-short-haul clause of Section 4 of the Act; that is, because it would make applicable over the circuitous route rates which were lower to the more distant point than rates to intermediate points on the route. The facts of record showed (R. 29–31)

that there were intermediate points on the circuitous route to which the rates were higher than the rates made applicable by the rule of tariff interpretation to the more distant point, Superior, Wis. In response to this contention of the carrier the Circuit Court of Appeals said:

> The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public; that there could be no useful purpose in forbidding such a choice and that it was not the intention of the above section to announce a prohibition of this character. (R. 77.)

THE STATUTE

The pertinent provisions of Section 4 read:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory

for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

ARGUMENT

The ruling of the Circuit Court of Appeals that Section 4 of the Interstate Commerce Act has no application in a case of this kind is erroneous.

The carrier urged before the Commission that the tariffs involved should be so construed as to apply only over the short route, and it was pointed out that the application of the rates in question over the longer route would produce violations of the long-and-short-haul clause of Section 4 of the

Interstate Commerce Act. In the Commission's report it was, among other things, said:

> Complainant's witness testified that 20 of its shipments were reconsigned and moved through Minneapolis to Superior at the through rate. Whether cars of other shippers moved in like manner under the same rate is not shown. A witness for the Great Northern testified that the 20 cars referred to were permitted to move over the long route at the through rate by error and oversight. It appears that previously it was the custom to apply the through rate only via the direct route and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. *Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the interstate commerce act.* (Italics ours.) (R. 54–55.)

Despite the fact that such interpretation would mean that the carrier was guilty of violating the long-and-short-haul clause of the fourth section, the Commission considered that such interpretation had to be given to its tariffs. After quoting from *Pioneer Lumber Co.* v. *Director General*, 74 I. C. C.

288, involving a closely analogous situation, the Commission said:

> The route from points of origin herein through Minneapolis to Superior was an open route and in the absence of restricted routing it must be found that the through rates to Duluth[1] applied over the route traversed. (R. 55.)

The Commission's decision was, then, that the carrier's tariffs had to be interpreted in accordance with the established rule, and that, when so interpreted, they made the lower rate applicable over the circuitous route; from which it followed that the lower rate had to be applied to the shipments, since any departure from applicable tariff rates is forbidden by Section 6 and by the Elkins Act. At the same time the Commission clearly showed that it was its view that the carrier, by having in its tariffs applicable rates over the circuitous routes which were lower to the more distant point than rates to intermediate points on that route, was in violation of the long-and-short-haul clause when shipments moved over that route upon which the lower rates had to be applied. The decision of the lower court is, on the other hand, to the effect that there was no violation of Section 4 involved in the situation. Its holding in this particular follows:

> (4) The contention of the carrier that to adopt the above rule as applied to these facts

[1] Duluth and Superior appear to be one point for rate-making purposes. (R. 29.)

would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act as amended (49 USCA paragraph 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. *The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public, that there could be no useful purpose in forbidding such a choice, and that it was not the intention of the above section to announce a prohibition of this character.* (Italics ours.) (R. 77.)

As we interpret the Court's decision, it holds that where a carrier has two routes between a point of origin and a point of destination and observes the provisions of Section 4 over the shorter of the two routes, it does not violate the provisions of that section if it applies that rate over the longer route and at the same time charges higher rates from and to intermediate points. If this doctrine is sound where the two routes are formed by the lines of the same carriers, it would seem that it

could be claimed with equal force that it should apply where the routes are formed by two or more carriers, and if such carriers have complied with Section 4 over the direct route, they would not be in violation of that section if they should apply the same rate over a circuitous route and maintain higher rates from and to intermediate points. It is hardly necessary to point out that such a construction of Section 4 would destroy its application in a large majority of the situations in which it is now held to apply.

The ruling of the lower court is contrary to that which has been taken by the Commission since Section 4 was amended in 1910,* and seems to us to be contrary to the law involved in the application of that section.

In *Railroad Commission of Louisiana* v. *A. H. T. Ry Co.*, 41 I. C. C. 83, 123, 124, the Commission said:

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*The 1910 amendment is indicated by the Italics in Section 4 as follows:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter*, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance."

In many instances circuitous lines in Texas meet the rates made upon a mileage scale by the direct lines at competitive points, but carry higher rates at intermediate points. In establishing rates from Shreveport to Texas points that will harmonize with the rates from near-by points in Texas to the same destinations, it may be that relief from the provisions of the fourth section of the act to regulate commerce will be necessary.

Carriers operating circuitous routes between Shreveport and Texas points and desiring to meet at competitive points the rates made by the direct lines while maintaining higher rates to intermediate points, will be expected to make application to the Commission for authority to do so.

Many of the rates between Shreveport and Texas points exceed the sums of the intermediate rates via Waskom or some other Texas point. If both intermediates are subject to the act to regulate commerce, through rates which are higher than the aggregate of the intermediate rates are in violation of the fourth section. In those instances in which rates between two Texas points are filed with this Commission for use in making up interstate rates they become component parts of through interstate rates and are therefore subject to the act.

The disposition above outlined and the orders in *Through Rates to Points in Louisiana and Texas*, 38 I. C. C. 153, will correct

the violations to which our attention has been directed.

If the rates between Shreveport and Texas points are reduced to the level of the Shreveport scale or any scale approximating it, the rates now in effect between Foster, La., and other Louisiana points, on the one hand, and points in Texas on the other, will be greatly out of proportion to the rates between Shreveport and the same Texas points, and in some instances will be higher than the aggregate of the intermediate rates to and from Shreveport. We make no order at this time respecting the rates between these Louisiana points and Texas, but the carriers will be expected to readjust these rates to harmonize with those herein found reasonable between Shreveport and Texas points. If this is not done the matter may be brought to our attention by appropriate proceedings.

In *Milk and Cream Rates to New York City*, 45 I. C. C. 412, at pages 431–2, the following appears:

* * * Where circuitous lines desire to meet the rates based upon the distances from competitive points over the direct routes, and to maintain higher rates from intermediate points, applications for relief from the provisions of the fourth section of the act should be filed.

The Commission, in *Brick and Clay Products in the South*, 113 I. C. C. 380, 381–2, said:

Section 4 of the act provides that, in exercising the authority conferred upon us to grant relief from the long-and-short haul re-

quirements of that section, we shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. The rates over the direct routes are those prescribed by us as reasonable maximum rates. In our opinion such rates would not, if applied over routes of substantially greater circuity than the maxima prescribed in our fourth-section order, be reasonably compensatory for the service performed. Furthermore, and apart from this requirement of the law, section 15 (a) provides that carriers are entitled to the fair return there prescribed "under honest, efficient and economical management." The unnecessary hauling of traffic over unduly circuitous routes at the same rates that are applicable over direct routes results in wasteful transportation. It is manifest, however, that publication of all routes over which the rates apply would impose upon respondents tremendous labor and expense and would result in such increase in bulk of tariffs as to render them cumbersome and difficult to use. The problem, therefore, is to devise some means of limiting the application of the rates to reasonably direct routes without specific publication of such routes.

In *Duluth Chamber of Commerce* v. *C. & N. W. Ry. Co.*, 156 I. C. C. 156, 165–6, it was said:

The second order made by division 2 was directed against all defendants according as they participated in the transportation, thus

requiring defendants operating over circuitous routes to establish rates over such routes on the same basis as was prescribed over the direct routes. Defendants ask that the order be modified to permit defendants whose lines are more than 15 per cent circuitous to withdraw from participation in the traffic. Our finding and order hereinafter made will require the establishment of the rates found reasonable only over the shortest routes as defined. Upon appropriate application the matter of fourth-section relief to enable lines or routes more than 15 per cent circuitous to meet the rates over the short lines or routes and to maintain higher rates at intermediate points will be given consideration.

And in *United Paperboard Co., Inc.*, v. *B. & O. R. R. Co., et al.*, 153 I. C. C. 453, 455–6, it was said:

As the result of a further hearing in the *South Bend Chamber of Commerce case, supra,* reported in 61 I. C. C. 67, the carriers were granted fourth-section relief to maintain class and commodity rates to Elkhart lower than rates to intermediate points in Indiana except in those instances where the equidistant clause of the fourth section operated to prevent relief. Some of complainant's shipments moved over routes as to which the distance to Wabash is less than the short-line distance to Elkhart. The maintenance of rates to Wabash over these routes was therefore contrary to the terms of the fourth-section order referred to, and not being otherwise authorized by us was in violation of the fourth section of the act.

> Complainant also contends that there are lower rates in effect to Anderson and Marion over routes through Wabash. Practically all of these violations have since been removed, and defendants are arranging to eliminate promptly any which may still exist.

See also *Proportional Basing Fares to Ogden*, 73 I. C. C. 434.

This Court has had before it the construction of Section 4 of the Act in a number of cases.

In *United States* v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, the Court held that after the 1910 amendment to Section 4, the authority of the railroads to primarily determine for themselves the propriety of charging higher rates for the shorter haul than for the longer haul ceased to exist and was vested in the Interstate Commerce Commission.

As we interpret the decision of the Circuit Court of Appeals it is in conflict with that of this Court in *Davis* v. *Portland Seed Company*, 264 U. S. 403, where the Court held that Section 4 of the Act is violated, and the carrier incurs, prima facie at least, the penalties prescribed by Section 10, by publishing, without authority from the Commission, a lower rate for the longer haul than that scheduled for the shorter haul of the same kind of property over the same line and in the same direction.

In the case of *Skinner & Eddy Company* v. *United States*, 249 U. S. 557, the Court held that the specific purpose of Section 4 was to prevent

discrimination by charging less for the longer than for the shorter haul unless, in the opinion of the Commission, conditions make such action just. Permission from the Commission is essential to warrant a carrier charging less for the longer than for the shorter distance haul, and in the case now under review such permission was not obtained. Compare *Intermountain Rate Cases*, 234 U. S. 476; *Patterson* v. *Louisville & Nashville R. Co.*, 269 U. S. 1.

The question of whether the lower court has correctly interpreted Section 4 is one of importance to railroads and shippers alike, as well as to the Interstate Commerce Commission, and goes beyond the small sum involved in this proceeding. Other cases are now pending before the Commission, both on its informal and formal dockets, the disposition of which would be governed by the case at bar.

The construction the lower court has placed on Section 4 is plainly erroneous, contrary to long-continued interpretation of the Section by this Commission, and, if allowed to stand, will seriously interfere with the Commission's administration of the Section. To that extent we think the lower court's opinion should be modified.

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For Interstate Commerce Commission.

Daniel W. Knowlton,

Of Counsel.

March, 1931.

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